STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

RODERICK LOUIS PIPPEN

Defendant-Appellant
_____/

Supreme Court No. 153324

Court of Appeals No. 321487

Lower Court No. 10-6891-01

WAYNE COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee
_____

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SUPPLEMENTAL BRIEF

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STATEMENT OF FACTS

Defendant-Appellant Roderick Pippen incorporates the statement of facts set forth in his Application for Leave to Appeal.

ARGUMENT

I. Trial counsel was ineffective for failing to investigate and present the testimony of Michael Hudson, a crucial defense witness. Mr. Pippen is entitled to a new trial.

Issue Preservation

Mr. Pippen filed a timely motion for new trial on the issue of ineffective assistance of counsel and the trial court presided over an evidentiary hearing on this issue pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). The issue is preserved for appellate review. *People v Wilson*, 242 Mich App 350, 352; 242 Mich App 350 (2000).

Standard of Review

The performance and prejudice components of an ineffective assistance of counsel claim are mixed questions of fact and law. *Strickland v Washington*, 466 US 668, 698; 104 S Ct 2052; 80 L Ed 2d 674 (1984). This Court applies *de novo* review to the trial court's legal conclusions, but reviews its factual findings for clear error. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

Background

This appeal stems from a jury trial held on March 17, 19, 20, and 24, 2014, before the Honorable Timothy Kenny of the Wayne County Circuit Court. Defendant-Appellant Roderick Pippen stands convicted of felony murder, assault with intent to commit great bodily harm less than murder, possession of a firearm by a felon, and two counts of felony-firearm. T4, 137.[1]

The charges arose from the murder of Brandon Sheffield on July 21, 2008, during what appeared to be an attempted car-jacking. At trial, the prosecution alleged that Mr. Pippen was the shooter and presented the testimony of Sean McDuffie—a witness they now acknowledge

[1] References to the trial transcript are denoted by "T" followed by the volume and page number. References to the evidentiary hearing are denoted by "EH" followed by the volume and page number.

had "credibility issues"[2]—and ballistic evidence that demonstrated that a gun found in connection to Mr. Pippen on October 18, 2008, was the same weapon used in the shooting on July 21, 2008. The defense called no witnesses. T4, 88.

Mr. McDuffie testified that one night in the summer of 2008, he was riding around in a car with Michael Hudson and Mr. Pippen when Mr. Pippen said that he saw someone he knew and asked Mr. Hudson to stop the car. T4, 34. According to Mr. McDuffie, Mr. Pippen then got out, walked over to the driver of a truck as if he was going to talk to him, and then shot him. T4, 34-35, 41. Mr. McDuffie explained that he had no idea what the shooting was about and that neither he nor Mr. Hudson knew that it was going to happen. T4, 58-59. The jury was told repeatedly that Mr. Hudson witnessed Mr. Pippen commit this crime, but they never heard from Mr. Hudson.

An evidentiary hearing was held in the trial court pursuant to Mr. Pippen's motion for new trial. The sole issue presented at the hearing was whether Mr. Pippen's trial counsel was constitutionally ineffective in failing to investigate and present the testimony of Michael Hudson.

At the hearing, trial counsel for Mr. Pippen acknowledged that he knew about Mr. Hudson and that Mr. Hudson was readily available, but stated he never spoke to him prior to trial as he "had no intention of calling him as a witness." EH, 11-12.

The trial court also heard from Michael Hudson who testified that Sean McDuffie's trial testimony was not true. EH, 31. Mr. Hudson was never driving in a car with Mr. Pippen and Mr. McDuffie when Mr. Pippen asked him to stop the car then got out and shot someone. Further, he never saw Mr. Pippen shoot anyone, ever. EH, 31. What's more, when, prior to trial, Mr. Hudson learned about what Mr. McDuffie told the police, he informed multiple people that Mr. McDuffie was lying, including a private investigator hired by the Pippen family. EH, 32.

[2] See *The People's Brief in Opposition to the Defendant's Application for Leave to Appeal* at 41.

Mr. Hudson would have been willing to testify as a witness for Mr. Pippen. EH, 33

Trial counsel failed to conduct a reasonable investigation and interview Mr. Hudson, a readily available, purported res gestae witness to the crime. As a direct result of this failure, he did not call Mr. Hudson who would have testified that Mr. McDuffie was lying, and that he never witnessed Mr. Pippen shoot anyone.

This Court has ordered oral argument on Mr. Pippen's application for leave to appeal the affirmance of his convictions. *People v Pippen*, __ Mich __; 889 NW2d 503 (February 1, 2017) (Docket No. 153324) (attached as Appendix A). At issue is "whether the defendant was denied the effective assistance of counsel based on counsel's failure to adequately investigate and present testimony from a res gestae witness." *Id.*

Analysis

Under the Sixth Amendment to the United States Constitution, criminal defendants are guaranteed the right to effective assistance of counsel. *Strickland*, 466 US at 686. In *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994), this Court adopted the ineffective standard established in *Strickland*. Accordingly, to demonstrate ineffective assistance, a defendant must show that his attorney's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense. *Strickland*, 466 US at 687. In considering these two components, "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." *Id.* at 696.

A. Trial counsel performed deficiently when he failed to conduct a reasonable investigation into Michael Hudson.

"A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* "The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.* at 690.

1. The failure to conduct a reasonable investigation itself constitutes deficient performance and it is that failure that must be the focus of a reviewing court's inquiry.

The proper functioning of the adversarial process demands independent investigation and preparation by counsel. "[T]he Sixth Amendment imposes on counsel a duty to investigate, because reasonably effective assistance must be based on professional decisions and informed legal choices can be made only after investigation of options." *Strickland,* 466 US at 680.

Under the Sixth Amendment guarantee, a criminal defendant is entitled to the benefits of counsel's informed judgment and choice among reasonable alternatives. It is objectively unreasonable for defense counsel to make an uninformed decision about an important matter without justification for doing so. As the Supreme Court said in *Strickland,* "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable," but "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 690–91. Thus, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691. "In any ineffectiveness case," therefore, "a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances," *id.*, taking into account "not only the

quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins v Smith,* 539 US 510, 527; 123 S Ct 2527; 156 L Ed 2d 471 (2003).

The issue in *Wiggins,* as in this case, was whether defense counsel's investigation was constitutionally deficient. The claim in *Wiggins* stemmed from "counsel's decision to limit the scope of their investigation into potential mitigating evidence" for use at sentencing. 539 US at 521. Although Wiggins' attorneys conducted some investigation into mitigation, they failed to look further into the circumstances of the defendant's life by retaining a forensic social worker to prepare a social history report. Had they done so, counsel would have discovered "evidence of the severe physical and sexual abuse petitioner suffered at the hands of his mother and while in the care of a series of foster parents." *Id.* at 516. While the lower courts concluded that counsel's failure to present such evidence was strategic, the Supreme Court reversed, holding that counsel's investigative performance was deficient and that the deficient performance was prejudicial—in other words, that his attorneys were constitutionally ineffective.

On the question of deficient investigative performance, the Court reiterated *Strickland's* language regarding strategic decisions made after less than complete investigation, including counsel's "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 521, quoting *Strickland,* 466 US at 690–91. Applying those principles, the *Wiggins* Court explained that its "principal concern in deciding whether [counsel] exercised reasonable professional judgment is not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of Wiggins' background *was itself*

reasonable." *Id.* at 522–23 (emphasis in the original; internal quotation marks and citations omitted).

Here, like in *Wiggins*, the issue in evaluating counsel's performance is not the reasonableness of the strategy counsel ultimately pursued at Mr. Pippen's trial, but "the reasonableness of the investigation said to support that strategy." *Id.* at 527.

2. The adequacy of an investigation must be judged from counsel's perspective at the time.

Both the trial court and the Court of Appeals failed to address Mr. Pippen's argument that trial counsel performed deficiently because he failed to conduct a reasonable investigation. Instead, they focused their inquiry on whether it was sound trial strategy not to call Mr. Hudson as a witness and concluded that trial counsel's decision was supported by tactical considerations.[3] This framework erroneously conflates the performance evaluation with the prejudice inquiry. See *Kimmelman v Morrison*, 477 US 365, 387; 106 S Ct 2574; 91 L Ed 2d 305 (1986).

In *Kimmelman*, the Court addressed Morrison's claim that his counsel rendered ineffective assistance in failing to challenge the admission of evidence gathered from his bed sheets, which he alleged were seized from his apartment by police in violation of the Fourth Amendment. The record reflected that counsel failed to move to suppress the evidence, "not due to strategic considerations, but because . . . he was unaware of the search and of the State's

[3] See EH3, 7-8 ("Mr. Glenn as trial counsel in this Court's view has, I think ample reason not to want to call someone like Mr. Hudson . . . I think that it would be very sound trial strategy certainly not to call Michael Hudson to the stand.); *People v Pippen*, unpublished per curiam opinion of the Court of Appeals, issued December 13, 2011 (Docket No. 300171) at 3 ("We agree with the trial court's conclusion that it was sound strategy for defense counsel not to call Hudson as a witness. It was reasonable to conclude that Hudson's credibility could be attacked, and that his testimony would minimally confirm that McDuffie was honestly testifying about who was present at the shooting . . .").

intention to introduce the bedsheet into evidence. Counsel was unapprised of the search and seizure because he had conducted no pretrial discovery." *Id*. at 385. The government sought to "minimize the seriousness of counsel's errors by asserting that the State's case turned far more on the credibility of witnesses than on the bedsheet and related testimony." *Id*. But, the Court rejected that argument, stating,

> [i]n this case … we deal with a total failure to conduct pre-trial discovery, and one as to which counsel offered only implausible explanations. Counsel's performance at trial, while generally creditable enough, suggests no better explanation for this apparent and pervasive failure to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. . . . At the time [defendant's] lawyer decided not to request any discovery, he did not—and, because he did not ask, could not—know what the State's case would be. **While the relative importance of witness credibility … and related expert testimony is pertinent to the determination whether [defendant] was prejudiced by his attorney's incompetence, it sheds no light on the reasonableness of counsel's decision not to request any discovery**. *Id*. at 386-387 (emphasis added).

Likewise, while Mr. Hudson's credibility and the potential impact of his testimony vis-à-vis the other evidence is pertinent to the determination whether Mr. Pippen was prejudiced by his attorney's deficient performance, it sheds no light on the reasonableness of counsel's decision not to investigate. *Id*.

Deficient investigation cannot be excused on the ground that a competent attorney, aware of the evidence that an adequate investigation would have uncovered, *could* have made an informed judgment to pursue an alternative strategy and not utilize that evidence at trial. See *Soffar v Dretke*, 368 F3d 441, 474, amended on reh in part 391 F3d 703 (CA 5, 2004) ("an actual failure to investigate cannot be excused by a hypothetical decision not to use its unknown results."). If counsel's investigation was unreasonable in its own right, then the performance prong of an ineffectiveness claim under *Strickland* is satisfied. See, e.g., *Kimmelman*, 477 US at

385-386; *Conner v Quarterman*, 477 F 3d 287, 293–94 (CA 5, 2007) ("The judgment is whether counsel's investigation was reasonable, not whether counsel's trial strategy was reasonable.") (citation omitted); *Outten v Kearney*, 464 F 3d 401, 417 (CA 3, 2006) ("[T]he question before us is not whether counsel should have introduced mitigating evidence.... It is whether the investigation supporting counsel's decision not to introduce mitigating evidence ... was itself reasonable.") (internal quotation marks and citation omitted).

Here, both the trial court and Court of Appeals sought to excuse counsel's failure to investigate by proposing reasons for why his "trial strategy" not to call Michael Hudson as a witness could have been reasonable. In contrast, U.S. Supreme Court case law requires reviewing courts to evaluate the reasonableness of trial counsel's investigation independently and before assessing the value of the evidence an adequate investigation would have uncovered. Yet lower courts continue to misapply *Strickland* by conducting a hypothetical prejudice inquiry within the performance prong. The error in the lower courts analysis is not isolated to this case.[4]

3. Trial counsel's failure to investigate Michael Hudson was not the result of reasoned strategic judgment.

When a reviewing court assesses the reasonableness of counsel's actions, it owes deference to counsel's informed strategic choices. In the present case, however, such deference does not come into play. There is no acceptable justification for trial counsel's failure to take the most elementary step of attempting to interview an alleged res gestae witness to the crime for which Mr. Pippen was charged.

[4] See *People v Keith T. Robinson*, unpublished per curiam opinion of the Court of Appeals, issued October 24, 2013 (Docket No. 298929) attached as Appendix B at p 5 ("Defendant contends that defendant's trial counsel and appellate counsel should have better investigated the time of Mrs. Sims's death and talked to and presented the testimony of Mr. Anderson at trial and on appeal. However, in light of the evidence presented at trial, it was clearly sound trial strategy for defense counsel to present an alibi defense.").

Under the prosecution's version of the facts, Mr. Hudson was present when the offense occurred, but did not participate in the crime. Notably, he was never questioned by police or the prosecution and was not listed as a prosecution witness. EH1, 32. At the post-conviction *Ginther* hearing, trial counsel testified that, though he knew Mr. Hudson to be readily available, he never spoke to him prior to trial. EH1, 12. By means of explanation, trial counsel stated that he "had no intention of calling [Hudson] as a witness" because "the way the facts looked, anybody who allegedly could have been placed in that car by McDuffie needed to be quiet." EH1, 12-13. On cross-examination, trial counsel reiterated his reason for not speaking to Mr. Hudson, stating: "[b]ecause looking at the circumstances of this case, if you're to believe Mr. McDuffie, Mr. Hudson was a get-away driver." EH1, 13.

Thereafter, the prosecutor provided trial counsel with Mr. Hudson's affidavit (made post-conviction), asked him to review it, and then asked him to engage in hindsight:

> Q: Now that you've read Mr. Hudson's Affidavit, is there any reason you wouldn't have called him as a witness based on what he says in his Affidavit, and what would have been the down-side to calling him?

EH1, 16. Trial counsel responded that he would not have called Mr. Hudson as a witness because Mr. Hudson was arrested with Mr. Pippen when the alleged murder weapon was recovered; he "assumed" Mr. Hudson was not going to claim possession of the gun, and it was his strategy to "raise some type of doubt as to who actually had that weapon." EH1, 17.

In finding counsel's performance to be both strategic and reasonable, the lower courts ignored the actual explanation counsel gave for not investigating Mr. Hudson which captured his thinking prior to trial, and instead endorsed hypothetical reasons trial counsel gave when asked to speculate about why "he wouldn't have called him as a witness based on what he says in his Affidavit." EH1, 16. Abandoning an investigation "at an unreasonable juncture" makes a

reasonable professional judgment impossible. *Wiggins*, 539 US at 527–28. The tactical considerations the trial court and Court of Appeals bestowed on trial counsel are exercises in "retro-speculative reasoning"[5] and are untethered from trial counsel's actual decision making. The complete failure to investigate a res gestae witness can hardly be considered a tactical decision. Trial counsel did not even talk to Mr. Hudson, let alone make some strategic decision not to call him. Indeed it was his deficient performance that deprived him of the opportunity to make a tactical decision about putting Mr. Hudson on the stand.

While reviewing courts are required to "indulge in a strong presumption that counsel's conduct falls within a range of reasonable professional assistance," they "may not engage in a post hoc rationalization of the counsel's decision making that contradicts the available evidence." *People v Gioglio* (On Remand), 296 Mich App 12; 815 NW2d 589 (2012) (internal citations omitted). There is an important difference between the tolerance of tactical miscalculations and the fabrication of tactical excuses. See *Griffin v Warden, Maryland Corr Adjustment Ctr*, 970 F2d 1355, 1358-59 (CA 4, 1992), citing *Kimmelman*, 477 US at 386-387.

When Mr. Pippen's trial counsel decided not to investigate a purported res gestae witness to the crime, he did not know what the state's case would be, he did not know what Mr. Hudson's potential testimony would be, and he had no sense of Mr. Hudson's credibility or persuasiveness as a witness.

Counsel's decision not to speak to the only other alleged witness to this crime "was not the sort of conscious, reasonably informed decision made by an attorney with an eye to benefitting his client that ... courts have denominated 'strategic' and been especially reluctant to disturb." *Pavel v Hollins*, 261 F 3d 210, 218 (CA 2, 2001). Rather, counsel's investigative omission was based on his problematic assumption that Mr. Hudson would not be helpful or

[5] *Griffin v Warden, Maryland Corr Adjustment Ctr*, 970 F2d 1355, 1359 (CA 4, 1992).

"needed to be quiet." Consequently, we owe no deference to counsel's "judgment" as to the scope of his investigation; counsel made no such judgment.

4. Trial counsel's duty to investigate "includes the obligation to investigate all witnesses who may have information concerning his client's guilt or innocence."[6]

Whether or not counsel's judgment was a "strategic" one is only the beginning of the inquiry. Ultimately, "[t]he relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v Flores–Ortega,* 528 US 470, 481; 120 S Ct 1029; 145 L Ed 2d 985 (2000) (citation omitted). *Strickland* established that this analysis is an objective one. *Strickland*, 466 US at 688. "Even where an attorney's ignorance of relevant law and facts precludes a court from characterizing certain actions as strategic (and therefore presumptively reasonable), . . . the pertinent question under the first prong of *Strickland* remains whether, after considering all the circumstances of the case, the attorney's representation was objectively unreasonable." *Bullock v Carver,* 297 F 3d 1036, 1050–51 (CA 10, 2002) (citations omitted).

Where a defendant asserts that his trial counsel performed deficiently in failing to investigate, a court must assess whether the challenged investigative omission was objectively unreasonable under the circumstances counsel confronted. The duty to conduct a reasonably thorough investigation "does not force defense lawyers to scour the globe on the off-chance something will turn up." *Rompilla v Beard,* 545 US 374, 383; 125 S Ct 2456; 162 L Ed 2d 360 (2005) (citation omitted). However, defense counsel has a basic obligation to make "an independent examination of the facts, circumstances, pleadings and laws involved . . . This

[6] *Towns v Smith*, 395 F3d 251, 258 (2005), citing *Bryant v Scott*, 28 F3d 1411, 1419 (CA 5, 1991).

includes pursuing 'all leads relevant to the merits of the case.'" *People v Grant*, 470 Mich 477, 486; 684 NW2d 686 (2004) (internal citations omitted).[7]

In particular, trial counsel's duty to investigate "includes the obligation to investigate all witnesses who may have information concerning his client's guilt or innocence." See *Towns v Smith*, 395 F3d 251, 258 (2005), citing *Bryant v Scott*, 28 F3d 1411, 1419 (CA 5, 1991). Without an understanding of the critical facts—whether they are favorable or unfavorable to the defense—counsel cannot ensure meaningful adversarial testing. See *Rompilla*, 545 US at 377 (finding counsel deficient for failing to obtain and review material which counsel knew the prosecution would probably rely on as evidence of aggravation at the sentencing phase of trial); See also *Kimmelman*, 477 US at 385 (counsel performed unreasonably in failing to conduct any pretrial discovery, which left him unaware of certain damaging evidence).

In *Towns*, the Sixth Circuit found that trial counsel's failure to conduct a reasonable investigation into a "known and potentially important witness" violated Towns' Sixth Amendment right to the effective assistance of counsel. *Id.* at 259, quoting *Blackburn v Foltz*, 828 F2d 1177, 1183 (CA 6, 1987). Although counsel acknowledged the need to contact the

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[7] The American Bar Association Standards for Criminal Justice also provide guidance in determining what constitutes reasonable investigation under prevailing norms of practice. See *Wiggins*, 539 US at 527-28 (referring to the ABA standards as "guides to determining what is reasonable"); *Rompilla*, 545 US at 387 (same). The standard relating to the duty of counsel to investigate provides in pertinent part:

> Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty. [ABA Standards for Criminal Justice, Defense Function, Part IV, Investigation and Preparation, 4-4.1(a).]

witness, he failed to do so, which constituted an abandonment of the "investigation at an unreasonable juncture," thereby "making a fully informed decision . . . impossible." *Id.* at 258–59, quoting *Wiggins*, 539 US at 527–28. Therefore, the court held that it was objectively unreasonable to pursue a trial "strategy" that does not require interviewing a witness, despite the fact that the witness is "known and potentially important." *Id.* at 259. Not surprisingly, other federal courts have reached the same conclusion. See, e.g., *Anderson v Johnson*, 338 F3d 382, 391 (CA 5, 2003) ("Guided by *Strickland*, we have held that counsel's failure to interview eyewitnesses to a charged crime constitutes 'constitutionally deficient representation.'").[8]

5. Trial counsel's failure to investigate Michael Hudson was objectively unreasonable under the circumstances.

Mr. Pippen was charged with first degree murder for the shooting death of Brandon Sheffield. As both defense counsel and the trial court remarked at the *Ginther* hearing, the prosecution's case rested on the testimony of a single witness, Mr. McDuffie, who had to be brought to court on a material witness warrant, and who received consideration in exchange for his testimony. EH1, 9; EH3, 4-5. After being questioned by police about "a whole bunch of shootings" and shown pictures of the Sheffield homicide scene as well as a sketch of Mr. Pippen, Mr. McDuffie provided police with information. PE[9], 60, 64-65, T4, 55-56, 75. He asserted that one night in the summer of 2008, he was riding around in a car with Mr. Hudson and Mr. Pippen, when Mr. Pippen inexplicably asked Mr. Hudson to stop the car. T4, 34. According to Mr. McDuffie, Mr. Pippen then got out, approached a man in a car, and shot him. T4, 34-35, 41. Mr.

[8] See also *Riley v Payne*, 352 F3d 1313, 1319 (CA 9, 2003) (counsel did not make a reasonable professional judgment to ignore an important corroborating witness); *United States v Debango*, 780 F2d 81, 85 (DC,1986) (suggesting that ineffectiveness shown by complete failure to investigate potentially corroborating witness but finding no prejudice in case before it); *Grooms v Solem*, 923 F2d 88, 90 (CA 8, 1991) ("it is unreasonable not to make some effort to contact [alibi witnesses] to ascertain whether their testimony would aid the defense").

[9] Preliminary Exam Transcript (6/29/10) abbreviated as "PE"

McDuffie maintained that he had no idea what the shooting was about and that neither he nor Mr. Hudson knew that it was going to happen. T4, 58-59. No other witnesses connected Mr. Pippen to the crime and there is no evidence that Mr. Pippen knew Mr. Sheffield. Additionally, Sean McDuffie's account of the incident was largely at odds with that of the surviving victims. See table, *infra* at p 23. As trial counsel himself opined at the *Ginther* hearing, Mr. McDuffie's testimony was the only testimony that pointed to Mr. Pippen, it was "dubious at best," and there were "strong issues with Mr. McDuffie's credibility." EH1, 9-10.

A reasonable investigation under the circumstances required investigating Michael Hudson. Not only was he an alleged eyewitness to the crime "who may have information concerning [Mr. Pippen's] guilt or innocence," *Towns*, 395 F3d at 259, he was the only person who could have provided an independent basis for attacking Mr. McDuffie's incredible testimony.

Additionally, other circumstances make counsel's choice not to speak to Mr. Hudson all the more insupportable. Foremost, Michael Hudson was readily available, which trial counsel acknowledged. EH1, 12. See *Rompilla*, 545 US at 385, 389 (the availability of the evidence in question is a relevant factor in considering the reasonableness of counsel's investigative omission). What's more, the record reflects that the police never attempted to interview Mr. Hudson, despite receiving information from Mr. McDuffie that he witnessed the offense. EH1, 32. Likewise, Mr. Hudson was not interviewed by the prosecution (EH1, 32), and was not on the People's witness list (T2, 4). If Mr. Hudson's testimony was likely to further implicate Mr. Pippen, one would expect the prosecutor to call him as a witness. Further, the lack of a prior statement to the police or prosecution meant that trial counsel had no idea what information Mr. Hudson would or could provide. Under these facts, no reasonable attorney would forego

interviewing Michael Hudson; defense counsel's failure to do so constitutes constitutionally deficient performance.

Furthermore, the explanations trial counsel provided for his failure to investigate do not constitute "a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 US at 691. First, counsel's testimony that he automatically foreclosed the possibility of Mr. Hudson as a defense witness because anyone who could have been placed in that car by Mr. McDuffie "needed to be quiet" was especially problematic. EH1, 12-13. For one, it demonstrated that counsel accepted Mr. McDuffie's version of events without "an independent examination of the facts [and] circumstances." *Grant*, 470 Mich at 486. Rather, it appears that counsel simply assumed that Hudson would not be helpful or that he would—or should—refuse to testify. An assumption that witnesses will not be helpful or will refuse to testify is an unreasonable substitute for actual investigation. See *Ramonez v Berghuis*, 490 F3d 482, 489 (CA 6, 2007) (counsel was constitutionally deficient for not making reasonable efforts to interview witnesses before coming to his ultimate choice of trial conduct). Next, counsel's explanation is at odds with the prosecution's theory of the case—that both Mr. McDuffie and Mr. Hudson had nothing to do with the crime—and Mr. McDuffie's actual testimony to that effect. Finally, and perhaps most importantly, it was trial counsel's duty to properly investigate and substantiate his client's primary defense, not to protect Mr. Hudson.

As discussed in more detail above, trial counsel's investigative omissions cannot be justified with the argument that it was his trial strategy to "raise doubt" about who had the weapon and that Mr. Hudson would have eliminated that doubt by not taking ownership of the gun. Such "*post-hoc* rationalization," *Wiggins*, 539 US at 526, puts the cart before the horse. The adoption of a trial strategy before having investigated a critical witness is not the kind of "reasonable

professional judgment[]" that could support the curtailment of further defense investigation. See *Strickland*, 466 US at 690-191. "To make a reasoned judgment about whether evidence is worth presenting, one must know what it says." *Couch v Booker*, 632 F3d 241, 246 (CA 6, 2011). Like in *Towns*, without having any contact with Mr. Hudson, "counsel was ill equipped to assess [his] credibility or persuasiveness as a witness," or to evaluate and weigh the risks and benefits of putting him on the stand. *Towns*, 395 F3d at 260 (internal citations omitted).

Moreover, counsel's post-conviction assertion—that it was his trial strategy to "raise some type of doubt as to who actually had that weapon" (EH1, 17)—is contradicted by the trial record. Despite trial counsel's testimony at the *Ginther* that "[his] whole point at trial was to say no, the murder weapon wasn't in Mr. Pippen's possession . . . he never had the gun," (EH1, 17) he never made this argument at trial. Rather, the trial record indicates that counsel's strategy was to attack Sean McDuffie's credibility. Indeed, at the outset of the hearing before being questioned about his investigation, counsel recalled that the prosecution's case against Mr. Pippen was circumstantial and that it "completely had to do with the credibility of [Mr. McDuffie]." EH1, 9.

What's more, trial counsel's recollection of the evidence presented at trial with respect to Mr. Pippen's arrest on Seven Mile and the murder weapon was inaccurate. Specifically, counsel testified that the arresting officer saw Mr. Pippen with an extended clip in his waistband and approached him, but that he "didn't see anybody drop a gun or throw a gun, anything like that." EH1, 17. Sergeant Bucy testified at trial that he not only saw a large magazine in Mr. Pippen's waistband but that he also saw Mr. Pippen take the gun from his waistband, drop it to the ground, and kick it under the car. T4, 13-14. When presented with the Glock, Sergeant Bucy testified that it was the gun that he saw Mr. Pippen discard. T4, 15. Furthermore, Sergeant Bucy

testified that he observed Mr. Hudson toss a different gun, which he identified as a Bersa Thunder 380. T4, 15-16.

Again, in assessing the shortcomings of the investigation performed by Mr. Pippen's trial counsel in the present case, the issue "is not whether counsel should have presented" at trial the evidence that ought to have been discovered. *Wiggins*, 539 US at 523. Rather, we must "focus on whether the investigation supporting counsel's decision not to introduce [such] evidence... *was itself reasonable.*" *Id.* (emphasis in the original). What Mr. Pippen's counsel knew "would [have led] a reasonable attorney to investigate further" before deciding what strategy to pursue. *Strickland*, 466 US at 527.

In sum, this is not a case where counsel made a reasonable decision to cease further investigation as a result of having "discovered ... evidence ... to suggest that" interviewing Michael Hudson "would have been counterproductive, or that further investigation would have been fruitless." *Wiggins*, 539 US at 525. Nor is this a case of "diligent counsel ... draw[ing] a line when [he has] good reason to think further investigation would be a waste [of time or resources]." *Rompilla*, 545 US at 383.

Instead, this is a case in which trial counsel failed to conduct the most basic investigation for his client facing a first degree murder charge—he failed to interview the only alleged res gestae witness to the crime because he *assumed*, without reason, that he would not be helpful. Under no theory of defense was trial counsel's failure to speak to Mr. Hudson reasonable.

B. Mr. Pippen suffered prejudice from trial counsel's failure to investigate and present Michael Hudson.

To establish prejudice, a defendant must show a reasonable probability that the outcome would have been different but for counsel's errors. *Strickland*, 466 US at 694. A reasonable probability need not rise to the level of making it more likely than not that the outcome would

have been different. *Id*. at 693. "The failure to make an adequate investigation is ineffective assistance of counsel if it undermines confidence in the trial's outcome." *Grant*, 470 Mich at 493.

The prejudice inquiry focuses upon two factors: (1) the strength or weakness of the case against the defendant; and (2) the effect of the error involved. As the *Strickland* Court explained, certain errors are more harmful than others. *Id.* at 695. "Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect." *Id.* at 695-696. "Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id.* at 696.

The trial court did not address prejudice and the Court of Appeals failed to properly consider the prejudicial effect of trial counsel's errors. Considering the totality of the evidence in this case, and Mr. McDuffie's credibility problems, there is more than a reasonable probability that had trial counsel conducted an adequate investigation and called Mr. Hudson as a witness, the result of the proceeding would have been different. See *Strickland*, 466 US at 694.

1. The case against Mr. Pippen was circumstantial and this Court should have grave reservations about the testimony of Sean McDuffie. Mr. Pippen's claim of prejudice is supported by the notable weaknesses in the prosecution's case.

Police first suspected Mr. Pippen in connection with the shooting after the Integrated Ballistics Identification System ("IBIS") results came back from the Michigan State Police indicating that the cartridge found in Mr. Sheffield's vehicle was a match with the gun seized in connection with his arrest on Seven Mile. T4, 74-75. They then went to Mr. McDuffie who had a warrant out for his arrest (and who they were familiar with due to his cooperation with police on another homicide) and questioned him about "a whole bunch of shootings." PE, 60, 64-65, T4, 55-56, 75. They showed him pictures of the homicide scenes and a picture of Mr. Pippen

and asked for information about Mr. Pippen's involvement in the Sheffield homicide, which Mr. McDuffie then provided. T4, 55-56, 74-75. He later attempted to withdraw his cooperation. PE, 49.[10] Notably, this is not a case where the gun evidence corroborated Mr. McDuffie's otherwise uncorroborated testimony. Indeed there is no other evidence tying Mr. Pippen to the gun at any time before October 18, 2008, or to the crime itself.

Outside of Mr. McDuffie's problematic testimony, the only evidence that Mr. Pippen committed this crime was that he fit an extremely vague physical description of the shooter and approximately three months after the shooting was in possession of the gun that was believed to be the murder weapon.

At trial, testimony was taken from the three individuals who were in the car with the victim: Kyra Gregory, Adam McGrier, and Camry Larry. No one identified Mr. Pippen as the shooter.

- Ms. Gregory was seated in the front passenger seat. T3, 77. When asked if she could describe the man or if the man was tall, she replied, "no." T3, 78.

- Mr. McGrier was seated behind Ms. Gregory in the rear passenger seat. T3, 78. At trial, the only information he could provide about the shooter was his height; he estimated that the man was about six foot. T3, 94.

- When Mr. McGrier spoke to police directly after the incident he described the shooter as having a dark complexion. T3, 106. At trial, he stated that he was not able to tell. T3, 105. Mr. Pippen has a light complexion.

- Ms. Larry, who is 4 feet 11 inches tall, described the shooter as a tall and "little" black man. T3, 54. She agreed that both Mr. Pippen *and* his trial attorney fit this general description. T4, 55, 60.

- Ms. Larry never saw the shooter's face and she was unable to provide any other details about his appearance. T3, 61-62, 72.

[10] Mr. McDuffie testified at the Preliminary Exam: "when I told them I wasn't telling them nothing they had took me down to Judge Kinny [sic]. And then he said they would lock me up for a year. And then after that they was going to charge me with perjury or something, which carries the same amount as the crime committed." PE, 49.

The prosecution contended that among Mr. Pippen, Mr. Hudson, and Mr. McDuffie, Mr. Pippen most closely fit the generic physical description of the shooter provided by Camry Larry. T4, 95. In a case where Mr. Pippen has consistently maintained that he was not present and not involved, this evidence is vague and unpersuasive.

Additionally, Mr. Pippen's possession of the weapon three months after the shooting is not overwhelming evidence of guilt that precludes Mr. Hudson's testimony from making a different result likely. First, the passage of time is relevant. This is not a case where a defendant is apprehended with the murder weapon hours or days after an offense. Second, there was no independent evidence that Mr. Pippen possessed this gun prior to or around the time of the shooting.

Plainly this was not a gun that Mr. Pippen came to possess legally. Street guns, like this one, change hands. According to the prosecution's own evidence, the gun originally belonged to someone named Darnell "Terry" Hicks who is now dead. T4, 37. Then, Norman Clark, who was present when Mr. Pippen was arrested with the gun on October 18, 2008, bought the gun from Mr. Hicks. T4, 65. Mr. Pippen had no way of knowing everyone who possessed the gun before him or how it was used. Indeed, the fact that Mr. Pippen pled guilty to possession of the firearm strengthens the argument that he was not aware that the gun he possessed was a murder weapon. Defense counsel could have and should have argued to the jury that people typically do not hang on to guns they have used to commit a murder and they certainly do not plead guilty if they are caught with a gun they know was used in a murder. The only evidence linking Mr. Pippen to this gun at the time of the shooting was Mr. McDuffie.

2. Trial counsel's failure to investigate and call Michael Hudson undermines confidence in the verdict.

This case boiled down to whether Sean McDuffie was telling the truth. It pivoted on the uncorroborated testimony of a single witness who had to be brought to court on a material

witness warrant, and who received consideration in exchange for his testimony. T4, 30, 51. Michael Hudson's testimony that he never saw Mr. Pippen shoot anyone, directly contradicts Mr. McDuffie's testimony at trial in a manner that tends to exculpate Mr. Pippen. EH, 31. Because trial counsel failed to investigate and call Hudson as a witness, the questionable testimony of Mr. McDuffie was allowed to go largely unchallenged. Furthermore, counsel's failure to present Mr. Hudson, especially considering the role Mr. Hudson played in the prosecution's narrative, allowed the jury to draw a negative inference against Mr. Pippen based on Mr. Hudson's absence.

Mr. McDuffie was brought to trial on a material witness warrant. T4, 30. On direct examination he first testified that he did not witness Mr. Pippen shoot anyone. T4, 33. The prosecution then sought to treat him as an adverse witness, and it was only after being shown his statement to police that Mr. McDuffie adopted the statements he had previously made under oath inculpating Mr. Pippen. T4, 33-35. What's more, Mr. McDuffie's testimony about the crime itself was fraught with problems. For one, it often lacked corroborating detail:

- Mr. McDuffie could not remember the type or color of car that he alleged Mr. Hudson was driving or whose car it was. T4, 37.
- Mr. McDuffie could not remember where or when this event happened, but stated that he believed it was near Morang, Kelly, or Houston Whittier and that it was sometime after 10:00 p.m. sometime during the summer of 2008. T4, 39, 42.
- Mr. McDuffie did not remember the victim's car rolling into a tree. T4, 61.

Mr. McDuffie's testimony also distinctly contradicted the testimony of the witnesses in the victim's car:

Matter in question	***Mr. McDuffie's testimony***	***Testimony of eyewitnesses***
Number of individuals in the shooter's car	Mr. McDuffie testified that there were three people in the car: Mr. Hudson, Mr. Pippen, and himself. T4, 59.	Ms. Larry and Mr. McGrier observed four individuals in the shooter's car. T3, 52, 101.
Whether the individuals in the shooter's car were disguised	Mr. McDuffie testified that no one in his car was wearing a mask or a bandanna and that no one in the car leaned out a window. T4, 57.	Ms. Larry testified that when the car first drove by the man in the front passenger seat was leaning out of the car and his face was covered from the nose down. T3, 52. She further stated that he was still masked when he approached the car a few minutes later. T3, 53. Mr. McGrier testified that the shooter and the three other men in the shooter's car had their faces covered with bandannas or scarves. T3, 101-102.
Whether the individuals in the shooter's car were armed	Mr. McDuffie testified that no one in the car displayed a weapon. T4, 57.	Mr. McGrier testified that all four of the men in the car had handguns. T3, 101-102.

At trial, counsel attempted to establish that Mr. McDuffie was a self-interested liar and that his account of the shooting could not be believed. T4, 105 ("What the people have brought to you is Mr. Sean – Mr. McDuffie, who was given a deal to close out his HYTA on a CCW, every reason to buy that would take away that case for him. That is not justice."); see also EH, 11. But, the jury heard no direct evidence refuting Mr. McDuffie's version of events. Instead, defense counsel was relegated to attacking Mr. McDuffie's credibility on cross-examination by questioning him about the benefit he received in exchange for his testimony and eliciting the

details of his story that contradicted the witnesses in the victim's car. T4, 53-67. In his closing argument the prosecutor acknowledged Mr. McDuffie's lack of particularity (T4, 94) and the differences between his testimony and the testimony of Mr. Sheffield's friends (T4 93, 108), but averred that discrepancies in otherwise truthful testimony can be explained by the passage of time and the distorting effect of fear on one's memory (T4, 93).

Mr. Hudson's testimony that he never saw Mr. Pippen shoot anyone would have directly contradicted Mr. McDuffie's testimony at trial and would have been actual evidence to the jury that Mr. McDuffie was not merely misremembering a traumatic event that happened six years prior, but rather lying to this jury regarding his actions in connection with this case. See *People v Armstrong*, 490 Mich 281, 292; 806 NW2d 281 (2011) (where impeachment evidence would have provided proof that a witness lied to the jury regarding his or her actions with regard to that very case, there is a greater possibility that the additional attack "would have tipped the scales in favor of finding a reasonable doubt about defendant's guilt.").

The prejudice to Mr. Pippen through the ineffective assistance of his trial counsel was exacerbated by the central role Mr. Hudson played (in absentia) in the prosecution's case. Though he was never interviewed by the police or prosecution, or called as a witness trial, Mr. Hudson was a major part of the story the prosecution presented to the jury. That story claimed there were three people in the world who knew who was responsible for the murder of Brandon Sheffield: Sean McDuffie, Roderick Pippen, and Michael Hudson. The jury was repeatedly told that both Mr. McDuffie and Mr. Hudson witnessed Mr. Pippen commit this crime (T2, 25, 27, 29, 35), and Mr. Hudson's name was mentioned 15 times in the prosecution's opening statement alone (T2, 24-36). During Mr. McDuffie's testimony, the prosecutor inquired about his relationship with Mr. Hudson and asked him to identify a photograph of Mr. Hudson, entered into evidence as

People's Exhibit 17. T4, 45. The prosecution then elicited testimony from Mr. McDuffie that Mr. Hudson was present when the shooting took place and that "he was just as shocked as [he] was" when it occurred. T4, 46. This narrative was reiterated in closing argument, and the prosecutor reminded the jury that Mr. McDuffie had identified photographs of both Mr. Pippen and Mr. Hudson. T5, 95.

A natural question that juror would have in hearing the prosecution's opening statement and Mr. McDuffie's testimony was whether Mr. Hudson was going to testify. See *Stewart v Wolfenbarger*, 468 F3d 338, 360 (CA 6, 2007); *Washington v Smith*, 219 F3d 620, 634 (CA 7, 2000). When Mr. Hudson did not testify, the jury likely assumed that the prosecution did not need him and the defense did not want him. Trial counsel's failure to investigate and call Mr. Hudson as a witness allowed the jury to draw a negative inference against Mr. Pippen based on Mr. Hudson's absence. *Stewart*, 468 F3d at 360 (counsel prejudices his client's defense when counsel fails to call a witness who is central to establishing the defense's theory-of-the-case, and the jury is thereby allowed to draw a negative inference from that witness's absence). This is especially so given the role that credibility and witness testimony played in this case. See *Harrison v Quarterman*, 496 F3d 419, 427-28 (CA 5, 2007).

3. Conclusion

Strickland teaches that some errors have "a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect." *Id*. at 695-696. The failure to adequately investigate and call Michael Hudson as a witness was the kind of error that altered the entire evidentiary picture. Given Mr. Hudson's testimony, there is a very real possibility that Sean McDuffie perjured himself on the stand and that Mr. Pippen had nothing to do with this offense. Considering the totality of the evidence in

this case, there is a reasonable probability that had trial counsel conducted an adequate investigation and called Mr. Hudson as a witness, Mr. Pippen would not have been convicted as charged. Mr. Pippen deserves the opportunity to present Michael Hudson's testimony to a jury and properly defend himself against these charges. Due process requires a new trial.

This Court should grant leave and reverse Mr. Pippen's convictions because the decision of the Court of Appeals is clearly erroneous and will cause manifest injustice to Mr. Pippen, the appeal concerns legal principles of major importance to the state's jurisprudence, and the opinion conflicts with decisions of this Court and of other panels of the Court of Appeals. MCR 7.302 (B). In recent years this Court has directly addressed counsel's duty to conduct an adequate investigation. See *People v Trakhtenberg*, 493 Mich 38, 51-52; 826 NW2d 136 (2012) (counsel's performance may be constitutionally deficient where counsel decides to forego particular investigations relevant to the defense); *People v Ackley*, 497 Mich 381, 390; 870 NW2d 858 (2015) ("While an attorney's selection of an expert witness may be a 'paradigmatic example' of trial strategy, that is so only when it is made 'after thorough investigation of [the] law and facts' in a case."). Notwithstanding the guidance in these cases, our lower courts continue to make the same analytical errors, namely (1) conflating *Strickland's* performance and prejudice prongs, particularly when assessing a claim of ineffective assistance of counsel for failure to conduct an adequate investigation and (2) engaging in post hoc rationalization of counsel's decision making that contradicts the available evidence. This case is an excellent vehicle for this Court to address these misapplications of the *Strickland* standard. The principles implicated in this appeal are of significant importance to the state, especially to criminal defendants like Mr. Pippen who are convicted without adequate pretrial investigation and thus without meaningful adversarial testing.

SUMMARY AND REQUEST FOR RELIEF

Defendant-Appellant Roderick Pippen asks this Honorable Court to grant leave to appeal and reverse his convictions, or any appropriate peremptory relief.

Respectfully submitted,

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